INTERNATIONAL LAW NEWS

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SECTION OF INTERNATIONAL LAW AMERICAN BAR ASSOCIATION

LGBT and Gender Discrimination

MALE. FEMALE. OTHER.

India Requires Legal Recognition of a Third Gender

By Mark E. Wojcik

A landmark judgment issued in April 2014 by the Supreme Court of India provides for legal recognition of a "third gender" apart from male and female. The judgment upholds the right of transgender persons "to decide their self-identified gender" and directs the national and state governments in India "to grant legal recognition of their gender identity" as male, female, or a third gender. The India Supreme Court also directed national and state governments to extend special consideration to transgender persons in admission to educational institutions and for public appointments. Government units were also directed to establish separate HIV centers for transgender persons, "to take proper measures to provide medical care" to transgender persons in hospitals, and to provide transgender persons with "separate public toilets and other facilities."

National Legal Services Authority v. Union of India was decided on April 15, 2014, by a two-judge panel of the India

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CHAIR'S COLUMN

LOUD AND CLEAR

The Section Speaks in Support of LGBT Rights

This Fall issue of *ILN* focuses on the very important and timely issue of LGBT rights. Even as we have the pleasure of seeing such rights become increasingly recognized in many states around the world, we also experience the bitter taste of regression in others. The contributors to this issue of *ILN* offer a variety of angles from which to consider global developments, but all have approached the subject with a deep recognition of the basic human rights issues involved. As they do so, they help us all towards a richer contemplation of evolving state regulation and the roles of judges and civil society in shaping modern states.

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The evolving field of LGBT rights is rich with important new developments, many of which we address in this issue. Consider the recognition of a third gender in a landmark judgment issued this year by the Supreme Court of India, the recognition that the Alien Tort Statute is applicable to a U.S. citizen advocating against sexual minorities in Uganda, the qualification of LGBT-related murders as "hate crimes" in Puerto Rico, and the acceptance of asylum status for LGBT persons seeking to avoid repatriation for fear of bias-based persecution. Our contributors also highlight the difficulties encountered in many countries where homophobia and ancient sodomy laws still confront LGBT persons with legitimate fears of social violence and official oppression. As one contributor noted, homosexuality and advocacy on behalf of LGBT persons is currently a criminal offense in 76 countries, including some in which conviction carries the death penalty.

Where state regulations fail to protect fundamental rights to self-determination, rights as basic as speech, association, and privacy, it is up to civil society and members of independent judiciaries to protect those rights. We are very pleased to report that, as a preeminent representative of civil society concerned with the rule of law worldwide, the ABA shares and is living up to that responsibility. This summer, at the 2014 Annual Meeting in Boston, the ABA House of Delegates approved Resolution 114-B, which the Section of International Law was pleased to co-sponsor, calling for legal respect for and recognition of LGBT rights around the world. Details of this successful Resolution appear in this issue. As members of the Section and of the ABA, we should all be proud that, on a key human rights issue of our day, our organization stated its position loud and clear. ◆

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Upcoming deadlines and themes:

Winter 2015 ILN
Theme: 2015 UN Sustainable Development Goals
Deadline extended to October 20, 2014

Spring 2015 ILN
Theme: South America
Deadline: December 1, 2014

Ideas for future themes and articles are welcome.

RECOGNIZING SEXUAL ORIENTATION AND GENDER IDENTITY AS HUMAN RIGHTS

ABA House of Delegates Affirms that Anti-LGBT Legislation Violates Human Rights

By Paul E. Johnson, Allin C. Seward, and Mark E. Wojcik

The world has seen a rapid increase in legal protections for same-sex relationships and in laws that prohibit discrimination based on sexual orientation or gender identity. In many parts of the world, advances in protecting the rights of lesbian, gay, bisexual, and transgender (LGBT) persons have spurred additional protections in neighboring jurisdictions and deeper levels of available protection. But some jurisdictions have not changed their laws, and others have adopted new laws as a backlash against these advances. These new laws discriminate against and punish any alternative expression of sexual orientation or gender identity.

The newly enacted laws present legal obstacles for LGBT persons in those countries and lead directly to acts of violence against LGBT persons in those countries.

Homosexuality, as well as advocacy and defense of rights of LGBT persons, is now a criminal offense in 76 countries around the world, carrying the death penalty in some cases. The toughening of anti-LGBT laws in Uganda and Nigeria was closely followed in the world media. (In August 2014, Uganda's anti-gay law was declared unconstitutional for having been enacted without a parliamentary majority, but the anti-gay climate the law helped create has resulted in attacks and killings of many persons.) Publicity over Russia's Anti-Gay Propaganda Law during the recent Winter Olympic Games in Sochi, Russia, was also closely followed. But even more recently, the Sultanate of Brunei increased the criminal penalty for consensual same-sex relations from 10 years to death by stoning. And the Supreme Court of India reinstated the constitutionality of its colonial-era sodomy law (which had previously been held unconstitutional under the Indian Constitution by a lower court), despite legal precedents promoting privacy rights and repeal of the original British law that was transplanted to its former colony. (On the other hand, another division of the

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Supreme Court of India recently made history in a decision recognizing a third gender.)

The American Bar Association has adopted a major policy resolution that will promote the global recognition of LGBT rights as human rights. The ABA House of Delegates adopted Resolution 114B on August 11, 2014, at the ABA annual meeting in Boston. The resolution was sponsored by the ABA Section of International Law, the ABA Section on Individual Rights and Responsibilities, and the ABA Commission on Sexual Orientation and Gender Identity. Glenn Hendrix, a former chair of the Section of International Law, presented the resolution to the House of Delegates. Among the other ABA entities that supported the resolution when it came before the House of Delegates were the Section of Individual Rights and Responsibilities, the Commission on Sexual Orientation and Gender Identity, and the Standing Committee on Professional Discipline.

Resolution 114B will promote LGBT rights as human rights in four ways. First, it has the ABA formally recognize that lesbian, gay, bisexual, and transgender persons have "a human right to be free from discrimination, threats, and violence" based on their sexual orientation or gender identity. The resolution provides that any law, regulation, rule, or practice that discriminates against LGBT persons on the basis of their sexual orientation or gender identity should be condemned. Second, it urges governments of countries with discriminatory laws to repeal those laws swiftly and to ensure safety and equal protection under the law for all LGBT persons. Third, it urges bar associations and individual attorneys practicing in jurisdictions with discriminatory laws to defend victims of anti-LGBT discrimination and violence and to support colleagues working as human rights advocates. And fourth, it urges the U.S. government to work to end anti-LGBT discrimination around the world and to ensure that LGBT persons receive equal protection under the law.

The ABA House of Delegates has previously adopted resolutions to urge the repeal of sodomy laws, to expand hate crime prohibitions to include crimes based on sexual orientation or gender identity, and to urge legal recognition of same-sex marriage. The success of those previous resolutions provided helpful background for the passage of Resolution 114B when it came before the House of Delegates.

The Report accompanying Resolution 114B described the purpose of the proposed Resolution as putting the ABA on record as recognizing LGBT rights as "basic human rights and opposing such laws, regulations, customs, and practices that proscribe these rights, and urging an end" to discriminatory laws and practices. Resolution 114B also put the ABA on record "as supporting the rights of LGBT people all over the world to live securely, safely, without fear and able to exercise the rights, privileges, and immunities of any other citizen without regard to their sexual orientation or gender identity." Finally, Resolution 114B urges the U.S. government "to take steps through diplomatic channels to support such rights."

By urging the repeal of discriminatory laws and practices, by supporting human rights advocates in legal challenges to anti-LGBT laws, and by supporting the promotion of LGBT rights through diplomatic channels, Resolution 114B will help LGBT persons around the world by formally recognizing LGBT rights as human rights as articulated in the Universal Declaration of Human Rights and in instruments such as the International Covenant on Civil and Political Rights. The resolution may help local, national, and regional organizations advance human rights and promote changes that will protect LGBT persons around the world. The resolution may thus help them to know that they are not alone in their struggle and that the organized bar in the United States stands with them. ◆

Text of Resolution 114B

Section of International Law
Section of Individual Rights and Responsibilities
Commission on Sexual Orientation and Gender Identity
American Bar Association

Report to the House Of Delegates

Resolution

RESOLVED, That the American Bar Association recognizes that lesbian, gay, bisexual and transgender (LGBT) people have a human right to be free from discrimination, threats and violence based on their LGBT status and condemns all laws, regulations and rules or practices that discriminate on the basis that an individual is a LGBT person;

FURTHER RESOLVED, That the American Bar Association urges the governments of countries where such discriminatory laws, regulations, and practices exist to repeal them with all deliberate speed and ensure the safety and equal protection under the law of all LGBT people;

FURTHER RESOLVED, That the American Bar Association urges other bar associations and attorneys in jurisdictions where there are such discriminatory laws or incidents of targeting of LGBT people to work to defend victims of anti-LGBT discrimination or conduct, and to recognize and support their colleagues who take these cases as human rights advocates; and

FURTHER RESOLVED, That the American Bar Association urges the United States Government, through bilateral and multilateral channels, to work to end discrimination against LGBT people and to ensure that the rights of LGBT people receive equal protection under the law.

COUNTRIES THAT PROHIBIT HOMOSEXUAL ACTS OR IDENTITY

Africa and Indian Ocean Region

Algeria, Angola, Botswana, Burundi, Cameroon, Comoros, Egypt, Eritrea, Ethiopia, The Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Libya, Malawi, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Nigeria, São Tomé and Principe, Senegal, The Seychelles, Sierra Leone, Somalia, South Sudan, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe.

Americas and Caribbean Region

Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago

Asia/Middle East Region

Afghanistan, Bangladesh, Bhutan, Brunei, Gaza/Palestinian Territories, India, Iran, Kuwait, Lebanon, Malaysia, Maldives, Myanmar, Oman, Pakistan, Qatar, Saudi Arabia, Singapore, Sri Lanka, Syria, Turkmenistan, United Arab Emirates, Uzbekistan, and Yemen.

Europe

Lithuania, Russia, and Turkish Republic of Northern Cyprus (unrecognized state)

Oceania

Cook Islands, Kiribati, Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, and Tuvalu

AMERICAN SOCIETY OF INTERNATIONAL LAW

Midyear Meeting and Research Forum

NOVEMBER 6–8, 2014

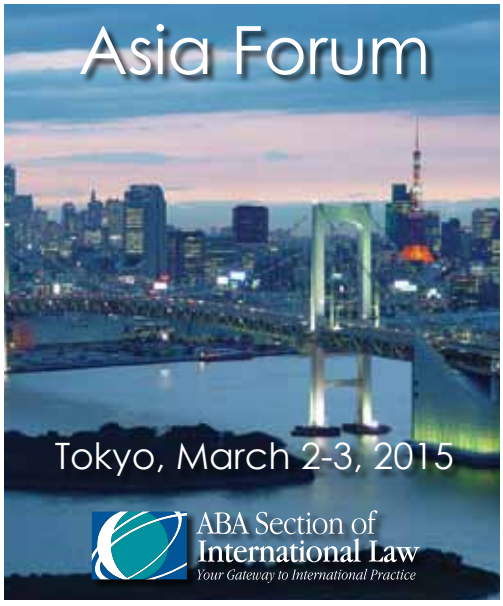
Chicago, Illinois

Invitation to Members of the Section of International Law to Attend at Discounted ASIL Rates

Through a recently renewed memorandum of understanding with the American Society of International Law (ASIL), the ABA Section of International Law is pleased to invite its members to attend ASIL's upcoming Midyear Meeting and Research Forum in Chicago November 6–8, 2014. Because the Section is a cooperating organization of the Midyear Meeting, its members may register for the conference at the highly discounted rate normally reserved for ASIL members. The Midyear Meeting will feature a number of interesting and useful sessions, including a discussion with Chief Judge Diane Wood (U.S. Court of Appeals for the 7th Circuit), an international law career development event, and the annual Research Forum for the presentation and focused discussion of 70 works-in-progress.

For more information, visit **www.asil.org/midyearmeeting** or contact ASIL Director of Education and Research Wes Rist at *dwrist@asil.org* or **+1-202-939-6008**.

UPCOMING EVENTS



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Supreme Court. The decision examines human rights treaties and foreign case precedents in finding that the Constitution of India required legal recognition of a third gender. And the decision was also seen as a curious answer to another two-judge panel decision of the India Supreme Court rendered in December 2013, *Suresh Kumar Koushal v. Naz Foundation*, which reinstated India's colonial-era sodomy law that a lower court had declared unconstitutional in 2009. Although some conservative leaders in India welcomed that decision reinstating India's colonial-era sodomy law, the decision was widely criticized and provoked street demonstrations against it.

The recognition of transgender persons under the Indian Constitution was a separate issue from the constitutionality of India's colonial-era sodomy law, however, and having separate decisions from different two-judge panels of the India Supreme Court presents an interesting opportunity to study comparative judicial procedure and jurisprudence.

The National Legal Services Authority, which served as petitioner for the transgender rights case, highlighted traumatic discrimination suffered by transgender persons in India and argued that all transgender persons in India had "a legal right to decide their sexual orientation and to espouse and determine their identity." And because transgender persons in India "are neither treated as male or female, nor given the status of a third gender, they are being deprived of many of the rights and privileges which other persons enjoy as citizens" of India. It was also argued that "the right to choose one's gender identity is integral to the right to lead a life with dignity," a right "undoubtedly guaranteed" under the Indian Constitution.

The Supreme Court decision reviewed the historical background of transgender persons in India and included an interesting discussion of *hijras,* eunuchs, *kothis*, *aravanis*, *jogappas*, *Shiv-shakthis*, and other groups. It also referenced Lord Rama in the epic *Ramayana*, who, upon being banished from the kingdom for 14 years, turned to his followers and asked all the "men and women" to return to the city. The *hijras,* however, did not feel bound by this request and stayed with him during his exile. Impressed with their devotion, Lord Rama gave them the power to confer blessings on people during auspicious occasions such as childbirth or marriage.

The India Supreme Court also reviewed more contemporary human rights instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the 2006 Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, as well as endorsements of the Yogyakarta principles by various UN committees, regional human rights bodies, national courts, and government commissions.

The right to choose one's gender identity is integral to a right to lead a life with dignity.

The India Supreme Court also examined other national courts' decisions on various aspects of recognizing transgender rights. A 2013 decision from the New South Wales Court of Appeal in Australia, for example, held that a lower court "erred in determining that the current ordinary meaning of the word 'sex' is limited to the character of being either male or female." Another decision cited was from India's neighbor, Nepal, where the Supreme Court of that country held in 2007 that Nepal "should recognize the existence of all natural persons including the people of the third gender other than the men and women."

The India Supreme Court also considered legislation from other countries, including Argentina, Australia, Canada, Germany, the Netherlands, and the United Kingdom. In reviewing cases and national legislation, it took particular note of authorities that did not require persons to have undergone or to be in the process of undergoing any hormonal therapy or sexual reassignment surgery. Under the Gender Identity Law passed in Argentina in 2012, for example, persons have the right to "recognition of their gender identity as well as free development of their person

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according to their gender identity and [they] can also request that their recorded sex be amended along with the changes in first name and image, whenever they do not agree with the self-perceived gender identity." To exercise those rights, it is not necessary to prove that any surgical procedure or other psychological or medical treatment has taken place. Additionally, the Argentine law also provides that "whenever requested by the individual, the adopted first name must be used for summoning, recording, filing, calling, and any other procedure or service in public and private spaces." And under new German legislation that entered into effect in November 2013, parents of children with intersex variation can register the sex of their children as "not specified." The German law also created an additional category of classification for passports: "M," "F," and "X."

The Court said it could not be "a mute spectator" to violations of transgender rights.

The India Supreme Court found that transgender people face multiple forms of discrimination and oppression in India, especially in the fields of health care, employment, and education. They also face serious human rights violations and harassment in places of public convenience, marketplaces, theatres, bus and railway stations, hospitals, and workplaces. India has no legislation dealing with transgender rights and the Court further concluded that Indian law recognizing only male and female genders denies transgender persons certain rights under laws relating to marriage, adoption, inheritance, succession, taxation, and welfare legislation. The India Supreme Court said that under the Indian Constitution, it could not be "a mute spectator when those rights are violated."

The Indian Supreme Court applied several constitutional provisions to the rights of transgender persons. Under Article 14 of the Indian Constitution, the state cannot deny to "any person" equality before the law or the equal protection of the laws within the territory of India. The Court found that Article 14 did not apply only to males or females and that nonrecognition of *hijras*/transgender persons denies them equal protection of the law and leaves them "extremely vulnerable to harassment, violence, and sexual assault in public spaces, at home, and in jail, also by the police."

Several other provisions of the Indian Constitution also applied to transgender rights. Article 15 of the Indian Constitution prohibits discrimination against any citizen on the basis of sex in access to shops, public restaurants, hotels, or places of public entertainment or in the use of wells and places of public resort maintained with any state funds. Article 16 prohibits employment discrimination on the basis of sex and "imposes a duty on the State to ensure that all citizens are treated equally in matters relating to employment and appointment by the State." Article 19 guarantees that all Indian citizens have the right to freedom of speech and expression, "which includes one's right to expression of his self-identified gender."

The India Supreme Court also cited Article 21, described as "the heart and soul of the Indian Constitution," which provides: "No person shall be deprived of his life or personal liberty except according to procedure established by law." The Court found that Article 21 covers "all those aspects of life which go to make a person's life meaningful" and that it "protects the dignity of human life, one's personal autonomy, one's right to privacy," and other rights. Because gender "constitutes the core of one's sense of being as well as an integral part of a person's identity," the India Supreme Court found that legal recognition of gender identity was "part of the right to dignity and freedom guaranteed" under the Indian Constitution.

The Court finally ruled that the determination of the gender to which a person belonged "is to be decided by the person concerned." The Court rejected any biological test and instead decided to "follow the psyche of the person in determining sex and gender." The India Supreme Court thus recognized a "third gender" and the right of transgender persons to self-identify their gender.

Considering the sources cited by the India Supreme Court from nations as diverse as Argentina, Germany, and Nepal, it should be clear that the issues of transgender rights are wide and varied. This groundbreaking decision gives legal recognition to a third sex without requiring prior medical treatment as a condition of receiving those legal rights. Employers, educational institutions, prisons, and government units at all levels have much to consider about changes that will be necessary, not only in India but around the world. ◆

THE ALIEN TORT STATUTE AND SEXUAL MINORITIES: *UGANDA V. LIVELY*

By Lana Shatat

The Alien Tort Statute (ATS) was enacted in 1789 as part of the Judiciary Act. Under the ATS, 28 U.S.C. § 1350, "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The ATS grants aliens the right to sue for a tort committed in violation of the law of nations or a treaty of the United States. Therefore, the plain meaning of the statute requires a party invoking the ATS to be: (1) an alien and (2) suing strictly for a tort, and one committed in violation of the law of nations or a treaty of the United States. Since the requirement of violation of the law of nations is not clearly defined in the statute, courts have struggled to define what constitutes such a violation based on historical context.

In *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004), the U.S. Supreme Court unanimously held that the framers intended the ATS to be a jurisdictional statute restricted to limited causes of actions. To bring suit under the ATS, the claimant must seek to enforce an underlying norm of international law defined and accepted as an international law norm familiar to Congress at the time the statute was enacted. The Court interpreted the statute as incorporating 18th century paradigms comparable to the violation of safe conduct, infringement of rights of ambassadors, and piracy. Plaintiff's kidnapping claim in this 2004 case did not fall into one of these traditional categories, and thus the Court dismissed his claim for lack of jurisdiction.

In *Kiobel v. Royal Dutch Petroleum Company,* 133 S. Ct. 1659 (2013), the Court confronted an issue involving extraterritorial-based allegations, and it considered the issue of whether the Court may recognize a cause of action under the ATS for violations occurring outside of the United States. The Court took a textualist approach in interpreting the ATS and concluded that the statute supported a presumption against extraterritoriality. Absent express language indicating its application beyond U.S. soil, the ATS was inapplicable. Additionally, the Court reasoned that, as a matter of international policy, the framers did not intend to make "the United States a uniquely hospitable forum for the enforcement of international norms." Further, the Court explained that "accepting petitioner's view would imply that other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world." As a matter of international public policy, the Court cautioned against subjecting foreign countries to domestic laws in order to safeguard U.S. citizens from being subjected to international tribunals.

Sexual Minorities Uganda v. Lively

Sexual Minorities Uganda (SMU), an organization located in Kampala, Uganda, is a nonprofit umbrella organization that advocates for the equal treatment and preservation of fundamental rights on behalf of the lesbian, gay, bisexual, transgender, and intersex (LGBTI) community. The defendant, Scott Lively, is an American citizen residing in Massachusetts. SMU alleged that Lively participated with several counterparts in Uganda in a decade-long persecutory campaign against the LGBTI community solely based on gender or sexual orientation and gender identity. From 2002–09, Lively worked from the United States with Stephen Langa and other prominent individuals in Uganda "to assist, encourage, consult with them to design and carryout plans to deny fundamental rights to the LGBTI." In 2002, Lively traveled to Uganda to attend the country's first anti-LGBTI conference and he spoke at several organized gatherings consisting of government officials, educators, and students. In these talks, he linked pornography to homosexuality, arguing that homosexuality was the driving force behind pornography, the rise of Nazism, and the genocide in Rwanda. Lively also published *Defend the Family: Activist Handbook* and *Redeeming the Rainbow* to encourage discriminatory policies against the LGBTI community.

From his home in the United States, Lively also allegedly reviewed and commented on the draft of the Anti-Homosexuality Bill before it was introduced into the Uganda Parliament. The bill proposed a death penalty for aggravated

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homosexuality and it criminalized advocacy on behalf of the LGBTI community. Despite the Uganda Parliament's rejection of the bill, governmental and communal oppression and violence against the LGBTI community intensified. For example, LGBTI activists and SMU's executive director were forced to flee Uganda or to go into hiding to avoid life-threatening situations. In 2012, as a result of the anti-LGBTI campaign's highly visible successes, SMU could no longer register as a nongovernmental organization.

The oppressive and highly influential anti-homosexuality campaign led SMU to file suit in the U.S. District Court for the District of Massachusetts in Springfield, Massachusetts. The organization invoked the ATS and Massachusetts state law, alleging that Lively "violated the law of nations and conspired to persecute the LGBTI community in Uganda." It sought compensatory, punitive, and exemplary damages; declaratory relief holding that Lively's conduct violated the law of nations; and injunctive relief enjoining Lively from undertaking further actions and from plotting and conspiring with others to persecute the plaintiff and the LGBTI community in Uganda. Lively moved to dismiss the suit for, among other reasons, lack of jurisdiction under the ATS and as violative of the U.S. Constitution's First Amendment protections on free speech.

In *Sexual Minorities Uganda v. Lively*, the district court relied upon Justice Kennedy's concurring opinion in *Kiobel* to recognize its jurisdiction under the ATS to potentially hold Lively liable for persecution on the basis of sexual orientation and gender identity. SMU alleged that Lively, while he was in the United States as well as in Uganda, aided and abetted the persecution of the LGBTI community in Uganda and that that persecution amounted to a crime against humanity. SMU contended that this violation fit well within the limited group of claims for which the ATS grants jurisdiction.

The court cited the Rome Statute on the International Criminal Court, art. 7(2)(g), July 1, 2002, 2187 U.N.T.S 38544, which defines persecution as "intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectively." The court noted that persecution rising to the level of a crime against humanity has repeatedly been held to be actionable under the ATS. Additionally, the court cited Rome Statute art. (7)(1)(h), which states that for persecution to amount to a crime against humanity, it "must be part of a widespread or systematic attack directed against any civilian population and must be based on the identity of a specific targeted group."

According to SMU, Lively's active collaborative role with legislative and executive officials and powerful private parties in Uganda occurred while Lively was in the United States and during infrequent yet highly influential trips to Uganda. In fact, Lively had admittedly played a crucial role in the drafting of the Anti-Homosexuality Bill presented to the Uganda Parliament. The court dismissed Lively's motion to dismiss because, among other reasons, SMU sufficiently stated a cause of action in alleging that Lively had aided and abetted the anti-homosexuality persecutory campaign by reviewing the draft of the bill, publishing works condemning homosexuality, and participating in national and international conferences aimed at implementing strategies to deprive the LGBTI community of fundamental rights.

Furthermore, the court noted that international courts have broadly interpreted the Roman Statute's identity of a group requirement to include persecution of discrete identity. Additionally, the court cited the International Criminal Tribunal for the Former Yugoslavia, finding that "there are no definitive grounds in customary international law on which persecution must be based and a variety of different grounds have been listed in international instruments." Thus, even if the LGBTI community had not been expressly identified, persecution has been understood by this court to include any discrete and targeted group facing intentional and severe deprivation of fundamental rights based on the group's identity.

Relying on *Kiobel*, Lively argued that the plaintiff lacked jurisdiction under the ATS because the statute does not extend to extraterritorial conduct. It is true that where conduct occurred solely abroad, "mere corporate presence" did not "touch and concern the . . . United States . . . with sufficient force to displace the presumption against extraterritorial application." *Kiobel*, 133 S. Ct. at 1669. However, the court found that the presumption against extraterritoriality applies only in instances where a defendant's actions do not occur within the United States. The plaintiff overcame the presumption against extraterritoriality at the point that Lively's domestic conduct became sufficient to violate an international law norm satisfying *Sosa*'s requirements of definiteness and acceptance among civilized nations.

The district court cited U.S. Supreme Court Justice Anthony Kennedy's concurring opinion in *Kiobel,* in which he wrote that "[O]ther cases may arise with allegations of serious violations of international law principles protecting persons . . . and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation." *Kiobel*, 133 S. Ct. at 1669. The lower court relied upon

Kennedy's statement to address the scope of the ATS application outside of the United States and to recognize the possibility that cases brought under the ATS may overcome the presumption against extraterritoriality. The ATS's application may be fact-specific, the lower court concluded.

SMU's case is distinguished from *Kiobel* in that in the latter, the conduct at issue occurred outside of the United States, whereas Lively allegedly participated in Uganda's anti-homosexuality movement mainly while he was present in the United States. His infrequent visits to Uganda alone could not rebut the presumption against extraterritoriality, and his participation from the United States with his Ugandan counterparts did overcome the presumption. Therefore, jurisdiction under the ATS was appropriate in the plaintiff's case. Moreover, its allegations were sufficient to support an ATS claim.

Although the organization has overcome the initial obstacle of properly invoking a claim under the ATS and it survived Lively's motions to dismiss, it must still prove all the facts it alleges at trial, which, as noted by the court, may be difficult. The court observed that Lively's First Amendment free speech argument will be at the center of debate following the close of discovery at the motion for summary judgment stage and will present the next major hurdle for SMU to overcome. However, not only does this case have the potential to offer more clarification on the statute's scope and application, it also presents an opportunity to deter persecution of individuals belonging to the LGBTI community and to hold persecutors accountable for participating in violations of international norms while operating from within the United States. ◆

UN SECRETARY-GENERAL WELCOMES UGANDA COURT DECISION

UN Secretary-General Ban Ki-moon issued an August 1 statement welcoming the decision by the Constitutional Court of Uganda to annul the country's Anti-Homosexuality Act as a victory for the rule of law. He called for further efforts to decriminalize same-sex relationships and address the stigma and discrimination that persist in Uganda against lesbian, gay, bisexual, and transgender persons.

The Secretary-General noted that everyone is entitled to enjoy the same basic rights and live a life of worth and dignity without discrimination, as affirmed in the United Nations Charter, the Universal Declaration of Human Rights, the Ugandan Constitution, and the recent resolution of the African Commission on Human and People's Rights on protection from violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity. ◆

ISN'T IT SAFE NOW?

How to Reconcile Official Tolerance and an Emerging LGBT Nightlife with Your Client's Fear of Returning Home

By Sabrina Damast, Jenna Gilbert, and Elizabeth Salinas

For decades, the U.S. Department of Justice's Board of Immigration Appeals (BIA) has recognized homosexuals as members of a particular social group for the purpose of U.S. asylum law. *See, e.g., Matter of Toboso-Alfonso*, 22 I&N Dec. 819 (BIA 1990). Though early cases involved government criminalization of homosexuality or pervasive societal violence against homosexuals, the landscape today is less clear, especially in many Latin American countries. Official government positions, which often promote tolerance toward the lesbian, gay, bisexual, and transgender (LGBT) community, are at odds with ingrained societal homophobia. The emergence of LGBT nightlife in capital cities draws attention away from the continuing violence that nonetheless pervades these countries. These confusing dichotomies can pose challenges to practitioners litigating LGBT asylum claims, especially when the U.S. Department of Homeland Security (DHS) seeks to rebut the presumption of a well-founded fear of persecution by demonstrating that country conditions have improved or that internal relocation is reasonable. This raises the important question: how does an advocate effectively demonstrate the objective reasonableness of a client's fear of harm in his or her home country in light of changing laws that protect the LGBT community, the formation of nongovernment organizations (NGOs) advocating for the rights of the LGBT community, and the existence of gay pride events that draw crowds in the tens of thousands?

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This article examines these seemingly contradictory country conditions and provides practitioners with country-specific contexts in which to develop asylum claims for their LGBT clients from Latin America. We begin with a case study focusing on our client, a Salvadoran gay male who was severely harmed by a variety of nonstate actors on account of his sexual orientation before fleeing to the United States in 2007. To protect the client's privacy, we have used the pseudonym "José" in this article. The litigation strategy of the DHS attorney assigned to José's case illustrates the striking difference between official Salvadoran governmental policy and the day-to-day treatment of LGBT Salvadorans. It also illustrates the differing attitudes toward the LGBT community in wealthy, urban areas of El Salvador and rural areas of the country. We then proceed to examine current country conditions in Honduras, Mexico, and El Salvador and how they relate to these dichotomies. We conclude with strategies for preventing seemingly contradictory conditions from discrediting a client's asylum claim.

José: A Case Study

José was only 11 years old when he was sexually assaulted by a teacher. The teacher continued abusing him for the next four years. By the age of 22, he suffered abuse at the hands of a cousin and a priest and endured a brutal rape by gang members. José reported none of these assaults to the authorities, fearing that the police, who he had observed mocking other homosexuals, would not protect him from further harm.

In 2001, José obtained a multiple-entry visa and traveled several times between the United States and El Salvador. In 2007, he remained in the United States beyond his period of authorized stay and was placed in removal proceedings in 2008. He applied for asylum in 2009 and testified about the horrific events he endured in El Salvador. He also presented the testimony of a country conditions expert, who confirmed that

Salvadoran society considers homosexual men to be "undesirables," outside the social norms of a machismo culture. Country conditions and news reports from the time that José fled El Salvador demonstrated that LGBT individuals were frequently harmed, with the violence culminating in a series of brutal attacks in June 2009, later dubbed "Bloody June."

Despite José's credible testimony and corroborating evidence, the DHS attorney sought to demonstrate that in 2013, José could safely live in El Salvador. During cross-examination of the expert witness, the DHS attorney asked a series of questions, based on five documents, about the existence of gay bars and pride parades in El Salvador. Though the expert acknowledged the existence of gay culture, he emphasized that the parades took place predominantly in large cities and that the gay bars and clubs were clustered primarily in the wealthy tourist area of the country's capital. He further explained that the tolerant attitudes within this cosmopolitan environment did not extend to rural areas of El Salvador.

The DHS attorney also questioned the expert about recent policy changes, including the nomination by the United States of an ambassador to El Salvador who promoted tolerance toward the LGBT community, the ban on government discrimination based on sexual orientation, and the design of an LGBT sensitivity-training curriculum for the Salvadoran police. The expert again acknowledged the reforms but stated that they were ineffective and that the Salvadoran security forces continued to discriminate against and abuse members of the LGBT community.

Finally, the DHS attorney questioned the expert about the work of Entre Amigos, an LGBT human rights group in El Salvador. The expert explained that the group's advocacy had resulted in repeated burglaries of its office, death threats against its director, and violent attacks on its members. In sum, the rise of LGBT advocacy and nightlife did not change the fact that José, as a homosexual male, was at a heightened risk of harm by both the police and gang members. Despite the expert's testimony, the DHS attorney asserted in her closing argument that changes in country conditions in 2012 and 2013 mitigated the likelihood that an LGBT individual would be harmed in El Salvador. José's asylum application was denied, but he was granted withholding of removal. His case is currently on appeal.

The LGBT Community in Honduras

Honduras has been called the "the murder capital of the world" and for good reason. According to a report by the United Nations Office on Drug and Crime, in 2012, there were 90.4 homicides for every 100,000 people. The LGBT community is one of the most vulnerable groups within the country. More than 90 LGBT people were killed between 2009 and 2012, with very little done to investigate these cases and bring the perpetrators to justice. Due to the social stigma and repression faced by the LGBT community, many cases of persecution, torture, and murder go unreported, including cases of police brutality. In those cases that are reported, impunity is rampant.

Growing international public outcry over unsolved cases and the continued stigmatization of these minority groups have recently caused the Honduran government to take measures to curb the violence. In January 2011, the government established a special unit in the Attorney General's Office in the nation's capital, Tegucigalpa, to investigate the murders of transgendered people. One year later, a similar special unit was established in San Pedro Sula, the second largest city in Honduras. In 2013, the Honduran Congress passed a law adding sexual orientation and gender identity to the classes protected from discrimination; these groups were also included in the hate crimes amendment to the penal code criminalizing harassment, intimidation, and injury caused someone on the basis of a legally protected ground. Even at the governmental level, however, there remains much progress to be made, as same-sex unions are expressly banned under the Honduran constitution and same-sex couples are not allowed to adopt children.

Moreover, the indicators of official tolerance are at odds with societal attitudes toward the LGBT community. Honduras is a predominantly Christian country, with the Catholic Church and Evangelical Protestants wielding great influence. These groups are highly intolerant of the LGBT community and often vocalize their opinions to the public. During the 2012 elections, a well-known Evangelical preacher used his platform to speak out against the LGBT community, calling on Hondurans to discriminate against these groups and to abstain from voting for LGBT political candidates. A coalition of LGBT groups filed a lawsuit against the preacher, asserting a violation of Article 321 of the constitution, which prohibits religious leaders from interfering with elections. The preacher was charged with the crime of discrimination against members of the LGBT community, but he was ultimately cleared of the charge and the case against him was dismissed. This is just one more example of conservative societal attitudes that promote intolerance and violence toward the Honduran LGBT community. These attitudes are further reflected in the efforts of members of the religious right to repeal the 2013 hate crimes amendment.

For the LGBT community in Honduras, there is a disparity between the laws as they are written on paper and

the laws as they are enforced. While there is a growing and visible LGBT community and laws on the books to protect them, they continue to be targeted as victims of hate crimes. They receive little police protection and, in many cases, the police themselves participate in the violence. Gay bars in Tegucigalpa have been raided by the police, who conduct arbitrary and illegal arrests of gay and transgendered people, depriving them of due process and their human rights. Many LGBT people have also been murdered in San Pedro Sula, which is the country's industrial center. Thus, even in the urban areas of Honduras, where tolerance seemingly exists, violence against the LGBT community persists.

The dichotomy between Mexico City's progressive policies and LGBT realities is a life-or-death matter.

The LGBT Community in Mexico

In 2009, Mexico City legalized same-sex marriage and adoption by same-sex couples. Gay bars exist in multitude, from the affluent Zona Rosa of Mexico City to Guadalajara, Cancun, and other large urban cities and popular tourist areas. In 2013, the Third International LGBT Latin American Conference, which focused on diversity and inclusion in the workplace, took place in Guadalajara. And yet, it is as though Mexico is a tale of two cities because LGBT individuals continuously fight for their lives on a daily basis within the country. In fact, Mexico is ranked as having the second highest number of homicides with LGBT victims in Latin America.

Government officials and the police systemically fail to investigate and prosecute incidents of abuse against LGBT individuals. In more serious cases, the police themselves commit the violence, which ranges from extortion to sexual assault and torture, against LGBT individuals with impunity, thereby perpetuating the cycle of mistrust for government officials and increasing the problem of underreporting homophobic hate crimes.

While Mexican society and some government officials are increasingly adopting more tolerant attitudes towards the LGBT community, machismo culture and conservative Catholic values continue to dominate the country's population and belief system, making progressive inroads less effective and denying many LGBT individuals the protections they should be afforded under the law.

Societal attitudes towards the LGBT community continue to lag behind official policies. Violent attacks against LGBT individuals, in public and in private, remain problematic. Homophobic hate crimes occur regularly and often in public. For instance, while in 2013 the Mexican state of Durango held a "Miss Gay 450 Durango" pageant, several contestants and spectators were injured when attackers released tear gas at the event.

Mexico City is easily Mexico's most officially tolerant city in light of legislative efforts to provide equal protection to the LGBT community and it has a thriving LGBT nightlife scene. It is the city that the DHS regularly suggests as a viable option for internal relocation. Yet even there, a culture of homophobia exists within the government apparatus. In recent years, a prominent member of a partisan Coordinating Group for Sexual Diversity and organizer of Mexico City's annual LGBT pride parade was brutally murdered in his home near Mexico City. In the 15 years leading up to and including the year that same-sex marriage was legalized, Mexico City had the most homophobia-related killings within the country. The stark dichotomy between the capital's seemingly progressive official policies and the reality for the LGBT community on the ground is a matter of life or death for LGBT individuals in Mexico.

While the LGBT community remains at risk even in the relatively progressive capital, the situation in rural areas remains even more dire. Societal intolerance has led to a labeling of homophobic hate crimes as "crimes of passion" whenever there is a domestic component to the crime. Such labeling is usually the result of prejudicial conclusions by investigating officers. Whether called a "hate crime" or a "crime of passion," however, the reality remains that LGBT people are brutally murdered, sexually assaulted, threatened, and discriminated against on a regular basis with little or no recourse. The violence is not limited to the private sphere, as prominent LGBT activists also continue to be targeted and attacked or murdered.

Violence against transgender individuals often manifests itself in more extreme ways. The bodies of transgender victims are often found with clear indications of torture or other forms of mutilation.

The LGBT Community in El Salvador

There are no legal restrictions on same-sex sexual relations or the organization of LGBT events in El Salvador. However,

same-sex marriage is illegal and the law prevents same-sex partners from jointly adopting children. Additionally, El Salvador has no antidiscrimination or hate crime laws.

The LGBT gay scene in El Salvador is very much underground. Discrimination and homophobia, both official and societal, are widespread. The country has a deeply conservative Catholic tradition and machismo culture, which augments repression of sexual minorities. In recent years, establishments known as local hangouts for the LGBT community have been illegally raided by police.

The murder rate in El Salvador is exceptionally high, with LGBT people and women disproportionately falling victim to homicide. According to a U.S. Department of State Travel Warning issued in April 2014, El Salvador's homicide rate is at its highest levels since 2011, with an average of nearly 10 people killed daily from mid-February through April 2014. Recent homicide studies indicate that in the majority of cases where an LGBT individual was murdered, the individual suffered torture, physical or sexual assault, or prolonged suffering prior to death.

Officially, El Salvador has made some attempts to overcome LGBT biases within the country, including the creation of a Secretariat of Social Inclusion, headed by First Lady Vanda Pignato. However, police and other public authorities are frequently reported to engage in violence and discrimination towards the LGBT community. Some of those who were brave enough to report incidents of violence have faced ridicule by the police and the Office of the Attorney General when attempting to make such reports.

Some LGBT NGOs, most notably Entre Amigos, exist within the country, but the existence of these groups has done little to prevent atrocities or change public or private opinions. People working with Entre Amigos have received death threats and their office has been placed under surveillance in an attempt to halt their LGBT advocacy. El Salvador hosts an annual pride parade in San Salvador, but that does little to counteract the violence that takes place with impunity.

LGBT individuals in El Salvador, in addition to facing threats of violence from the police, also have an increased risk of suffering from gang violence because of their sexual orientation or gender identity. At times, it is unclear whether the police and gangs act in conjunction with one another to victimize the LGBT community. For instance, in 2011, police officers verbally and physically abused a gay adolescent. According to the victim, after abusing the victim, the police made a telephone call and three gang members subsequently appeared and beat the victim unconscious. Whether the violent act that took place was isolated or part of a larger scheme of criminal conduct matters little if the effect is the same—the police perpetrate violence against the LGBT community and act with impunity, and the judicial system offers no relief for victims.

While the general population of El Salvador remains at risk for suffering gang violence, LGBT individuals are perceived as ideal targets for gangs for a number of reasons, which include the prevailing culture of impunity for crimes against LGBT people and the social stigma against sexual minorities that produces fear and aversion to those groups. When violence does occur, crimes are underreported. This underreporting is exacerbated by a fear of reprisals from the authorities that often perpetrate the violence, the ineffective judicial system, and the social stigma that surrounds the LGBT community. The media also aggravate the problem. News articles involving LGBT people generally reinforce the stigma attached to membership in the LGBT community and treat hate crimes as crimes of passion.

Tips for Practitioners

Having identified the stark contrast between official policy and societal attitudes in Latin America toward the LGBT community, the question remains: how should an advocate address changing country conditions without mitigating the client's fear? Thorough country-conditions research will be key to succeeding in these cases. An advocate cannot leave the DHS's evidence of official tolerance and gay nightlife unchallenged. Instead, an advocate must compile evidence that violence toward the LGBT community persists despite official policies and laws that protect the community. It is also important to document that those who are most visible, such as LGBT advocates and those who frequent pride events, are at an even higher risk of harm than those who hide their sexual orientation or gender identity. A fully developed record regarding the pervasive violence against the LGBT community will be integral to rebutting the DHS's evidence of changed country conditions or reasonable internal relocation. ◆

WHAT IS A HATE CRIME?

Fighting Bias and Violence Against Transgender Individuals

By Sarah B. Markenson

What Is a Hate Crime?

Significant acts of bias and violence against transgender individuals in the United States and around the world still occur even though the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, which extended the first-ever federal protections to transgender people in the United States, was signed into law in 2009.

In November 2009, Jorge Steven Lopez was decapitated and set on fire in Puerto Rico because he was a transgender teenager. Police did not investigate the hate crime. The conservative political and religious rhetoric in government has further entrenched the culture of bias and hate against transgender individuals. Even though the U.S. Hate Crimes Prevention Act applies in Puerto Rico, prosecutors have not applied it to charges because "hate" is difficult to prove. Demonstrating part of the problem with enforcement of the Act, Puerto Rican Senate President Thomas Rivera Schatz said in a judicial confirmation hearing, "Change will come to the Supreme Court . . . [It] will defend the rights of the Puerto Rican family, traditional family values, not this twisted [idea of a] family some try to implement through legislation or jurisprudence." http://miamiherald.typepad.com/gaysouthflorida/2011/06/deadly-assaults-in-puerto-rico-target-gay-and-transgender-people.html#storylink=cpy. Since Lopez's murder, there have been more than 20 more murders of gay and transgender people in Puerto Rico.

In sharp contrast, Israel's Prime Minister Benjamin Netanyahu and Justice Minister Tzipi Livni supported the Lesbian, Gay, Bisexual, and Transgender (LGBT) community after a 2009 shooting at a gay youth center in Tel Aviv. Shelly Yachimovich, a leader of the Israeli Labor Party, also condemned the hate crime and supported the LGBT community: "The pistol did not act on its own, the gunman did not act on his own—what stood behind him was incitement and hatred." Even the ultra-Orthodox Shas party, a frequent opponent of the LGBT community in Israel, issued a statement condemning the hate crime. Defense Minister Ehud Barak also said that law enforcement authorities must go out of their way to "suppress these atrocious acts and to use an iron fist to bring the perpetrator to justice." http://www.haaretz.com/news/livni-to-gay-israelis-don-t-let-hate-crime-stop-you-living-your-lives-1.281228.

The FBI defines "hate crime" as any "criminal offense against a person or property motivated in whole or in part by an offender's bias against a race, religion, disability, ethnic origin or sexual orientation (actual or perceived gender, sexual orientation or gender identity)." http://www2.fbi.gov/ucr/cius_04/offenses_reported/hate_crime. FBI statistics show that in 2012, 1,730 U.S. law enforcement agencies reported 5,796 hate crime incidents involving 6,718 offenses. Of these, 48.3 percent were racially motivated and 19.6 percent resulted from sexual-orientation bias. Within the sexual-orientation bias category, the FBI does not currently keep track of anti-homosexual versus anti-transgender bias—it is all looped into one category.

Cases in the United States

A 16-year-old transgender girl of color identified as "Jane Doe" by a Connecticut court was in solitary confinement in an adult prison, even though she was not convicted of or charged with any crime. Jane has mental health problems because of her traumatizing childhood. A relative raped her when she was eight years old. Her head was bashed into a wall when she was caught playing with dolls. http://www.motherjones.com/politics/2014/05/transgender-16-year-old-solitary-cell-adult-prison. By the age of 12, she was in the custody of the Connecticut Department of Children and Families (DCF), where she was repeatedly sexually assaulted. Eventually, she resorted to selling her body for sex. In January 2014, she assaulted a staffer at a Massachusetts juvenile facility. Her assault was in response to a male staffer approaching

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SECTION OF INTERNATIONAL LAW
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The Section's Nominating Committee, which is responsible for nominating individuals for specific Section offices, seeks your nominations of candidates for the following offices (appointments effective for the 2015–2016 ABA year):

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In order to nominate someone for one of these positions or to self-nominate, contact the Chair of the Nominating Committee, Gabrielle M. Buckley, as soon as possible via e-mail to *gbuckley@vedderprice.com* with a copy to Section Director Leanne Pfautz (*leanne.pfautz@americanbar.org*).

The Nominating Committee will make its nominations report to the Section Council at the Section Spring Meeting in Washington, DC, in April 2015. Elections will be held at the Section business meeting during the ABA Annual Meeting in August 2015.

Pursuant to the Section's Bylaws, the following persons will serve as the Nominating Committee for 2014–2015 ABA year. The Nominating Committee is comprised of members who serve by virtue of their present positions with the Section and two other members appointed by the Section Chair, as provided under the Bylaws).

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What is a Hate Crime?

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her from behind to restrain her. While the male staffer was dismissed, DCF overexaggerated the resulting injuries from Jane's assault and cited a Connecticut statute that allowed Jane to be transferred to an adult prison if in the child's "best interest" (*see* Study of Juvenile Transfers in Connecticut 1997 to 2002, Final Report, Spectrum Associates). Jane was in solitary confinement for over two months, moved to a psychiatric center, and recently moved to a home for delinquent boys. http://www.nhregister.com/general-news/20140713/transgender-teen-jane-doe-moved-to-home-for-delinquent-boys. Not only did DCF not protect Jane, it exaggerated Jane's actions and did not provide adequate mental health services. Jane did not create her own circumstances. She is a victim of a traumatizing childhood. She is a victim of sexual assault. She is a victim of bias.

LGBT people of color are almost two times as likely to experience discrimination and violence as compared to white LGBT victims. Further, transgender individuals are more than three times as likely to experience police discrimination and violence as compared to survivors and victims who are nontransgender, also referred to as cisgender, from the Latin-derived prefix *cis*–, "on this side of," an antonym of *trans*–, "across from" or "on the other side of." Similarly, in 2012, 73 percent of all U.S. homicide victims were people of color, yet LGBT and HIV-affected people of color represented 53 percent of total survivors and victims, according to the National Coalition of Anti-Violence Programs 2012 Report. Gay men are over three times as likely to report incidents of hate violence to the police as compared to survivors and victims who are not gay men. One conclusion that can be drawn is that many transgender people of color will not report hate crimes or effectively advocate for themselves because the discrimination they have faced leads them to believe that reporting will prove futile.

The story of CeCe McDonald illustrates the statistics. On June 5, 2011, Crishaun "CeCe" McDonald, a 23-year-old transgender woman of color, was walking with four friends past a bar in Minneapolis. A group of Caucasian people began harassing McDonald and her friends by yelling pejorative slurs, including "look at that boy dressed like a girl tucking her dick in." McDonald and her friends tried to walk away, but a woman hit McDonald in the face with a glass of alcohol, causing injury. When McDonald attempted to leave the scene, one of the men, an ex-convict and member of a white supremacist group, followed her. McDonald took a pair of scissors out of her purse to defend herself against the man. He was stabbed in the chest and died. McDonald was arrested that night and charged with second-degree intentional murder. Even though she was a victim of hate, McDonald pleaded guilty and was sentenced to 41 months in prison and served two-thirds of that sentence in a *men's* correctional facility. Unfortunately, there are many cases similar to those of Jane and CeCe that we do not hear about on the news.

How to Be an Advocate

The Supreme Court of India recently ruled that every human being has the right to choose a particular gender. As a result, all state and other legal documents now offer a third gender category: "transgender." The ruling came despite the Court's reinstatement of a ban on gay sex in December 2013 after a four-year decriminalization period and after recommending legislative change. While it is important to celebrate this win for the transgender community in India, it also makes the need for local LGBT community support and advocacy efforts in India abundantly clear, since each Indian community has its own bias, hatred, and legal issues. The same holds true in the United States.

When associated with a criminal act, expressions of hate should be admonished, especially when minorities and other vulnerable people are targeted, even though some progressive organizations such as the American Civil Liberties Union and many conservative religious groups are concerned that hate crime laws, particularly those including LGBT people as a protected class, criminalize beliefs and violate freedom of speech.

Some U.S. states and cities are taking pro-active steps to reduce bias and violence against transgender individuals, but certainly more action is needed. On June 16, 2014, President Obama signed an executive order prohibiting LGBT discrimination in federal contracting. While a federal contractor cannot discriminate against LGBT people, federal, state, and local governments still can. Legislative advocacy is still needed to pass the federal Employment Non-Discrimination Act.

Moreover, according to the National Center for Transgender Equality, California, Colorado, Connecticut, Hawaii, Maryland, Minnesota, Missouri, New Mexico, Oregon, Pennsylvania, and Vermont have hate crime laws that include gender identity or expression. But every state should have antidiscrimination laws that include sexual orientation and gender identity or expression.

Additionally, police officers need to be trained on how to respond to and protect victims of hate crimes. In April 2012, the Los Angeles Police Department issued a new policy on treatment of transgender individuals, *see* http://learningtrans.files.wordpress.com/2012/04/lapd-transgender-policies.pdf, intended to prevent discrimination and conflict. It included the following caveat:

> Treat transgender persons in a manner that reveals respect for the individual's gender identity and gender expression, which includes addressing them by their preferred name and using gender pronouns appropriate to the individual's gender self-identity and expression.

A similar policy should be implemented and followed in every U.S. city.

Beyond training police officers, juvenile center staff, and mental health professionals, lawyers and policymakers need to advocate for policies that protect transgender individuals from discrimination and violence. Irrespective of personal values or religious beliefs, as lawyers, we need to be aware of these injustices at all levels, from bullying in schools to severe violence against transgender individuals. Not only do we need to be aware and educate ourselves, we need to reach out to our vulnerable communities and help effectively advocate for their rights. ◆

PROFESSOR ROBERT LUTZ HONORED BY CALIFORNIA BAR FOR SERVICE IN INTERNATIONAL LAW

Former Section Chair Robert E. Lutz, rlutz@swlaw.edu, has received the Warren M. Christopher International Lawyer of the Year Award of the California Bar's Section of International Law. The award is conferred on legal practitioners who render extraordinary service to the profession in the field of international law. Lutz is professor of law at Southwestern Law School and is one of legal education's foremost authorities on international public and private law. ◆

GLOBAL PAY AND BENEFITS DISCRIMINATION

By Donald C. Dowling Jr.

At many multinationals, the push to globalize the human resources function begins with aligning certain aspects of compensation and benefits across borders. These may include the implementation of global executive rewards initiatives, regional commission plans and sales incentive programs, broad-based global incentives or bonuses, and global stock options or equity awards. In addition, sometimes a one-time event such as a merger or restructuring spawns special global offerings such as retention bonus plans and severance pay plans. And multinationals that conduct global employment law compliance audits sometimes export tools such as statistical adverse impact analysis.

But multinationals launching cross-border rewards programs and compliance audits need to comply with the targeted pay-related discrimination laws of each affected country. Because the United States imposes some of the world's most sophisticated sets of employment discrimination laws, U.S.-based multinationals may assume that we Americans enjoy a big head start in complying with employment discrimination mandates worldwide. But in the particular context of *pay/benefits* discrimination, this assumption is wrong. Foreign laws on pay and rewards discrimination can be surprisingly different from, and even significantly broader than, analogous U.S. concepts. Overseas, watch for unexpected doctrines like "comparable worth," "local citizenship" discrimination, "job category" or "colleague" discrimination—even "job category comparable worth" discrimination.

Here we examine the range of issues a cross-border rewards offering or compliance audit might trigger with respect to pay discrimination compliance abroad. At the broadest level, our analysis splits into two categories: "protected group" pay discrimination and "job category" pay discrimination.

"Protected Group" Pay Discrimination

Most of the world's more prominent jurisdictions impose general employment discrimination laws that prohibit employers from discriminating based on specified traits or groupings such as gender, race, and religion. These laws tend to reach hiring, firing, and terms of employment.

Adverse Treatment

Because rewards such as pay, benefits, bonuses, commissions, and equity grants are vital terms of employment, any employer that discriminatorily rewards its employees by favoring members of certain protected groups at the expense of others almost always runs afoul of protected group employment discrimination laws. This analysis is simple.

Disparate Impact

Many countries' protected group discrimination laws not only prohibit straightforward *adverse treatment* discrimination (called in Europe "direct discrimination"), but also "disparate impact" discrimination (called in Europe "indirect discrimination"). This means that even facially neutral compensation systems illegally discriminate if they disadvantage employees in one protected group. For Americans, this analysis is straightforward because "disparate impact" law in the United States is as evolved as most anywhere. Indeed, some of the subtler disparate impact scenarios actionable stateside are far less likely to draw notice overseas. An example here would be the position taken by the American EEOC in an April 2012 ruling that the refusal to hire convicted criminals has an illegal disparate impact against African-American and Hispanic men. Disparate impact law tends to be more developed in common law jurisdictions like Australia, Canada, New Zealand, South Africa, and the U.K.—but, by U.S. standards, it tends to be largely undeveloped elsewhere. Therefore, outside of common law countries, employers rarely launch American-style statistical adverse impact "regression" analyses to verify that employees' pay and rewards comply with gender discrimination laws. For example, these statistical analyses are virtually unknown in China, Japan, Germany, the Czech Republic, Hungary, and, for that matter, most other countries. That said, though, statistical adverse-impact-on-pay analyses do get run, on occasion, in the U.K. and Australia—in the U.K., these are called "job evaluation schemes." But these may be more common in the public sector than among nongovernment employers because in some jurisdictions equal

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pay claims arise mostly in the public sector. In Canada, though, statistical adverse impact analyses of pay/rewards are increasingly common.

Protected Group

In auditing compliance with local rules on both adverse treatment ("direct") and disparate impact ("indirect") discrimination, be sure rewards systems fairly compensate members of each locally protected group. Expect each jurisdiction to impose its own list of protected groups or traits. Most jurisdictions protect against gender, race, religion, disability, and (increasingly) age and sexual orientation discrimination. In addition, individual jurisdictions protect groups not normally protected elsewhere. In the European Union, to pay employee members of one political party more than employees in another party is theoretically illegal because the EU protects against discrimination on the basis of political opinion or belief. India protects against caste discrimination, Ireland protects the itinerant homeless ("travelers"), South Africa protects against HIV discrimination, China protects against discrimination on the basis of some but not all other communicable diseases, and laws in Yemen protect *al akhadam* (low-caste, dark-skinned servants). The United States may be unique in the world in protecting against discrimination on the basis of veteran status.

Gender

That said, in the specific context of *pay* discrimination (as distinct from discrimination in hiring, firing, and terms and conditions of employment beyond remuneration), the characteristic for which it is most vital to protect against discrimination is inevitably *gender*. Employees and government enforcers are particularly likely to look for gender discrimination when analyzing "equal pay" compliance of employer rewards systems. Many countries, including the United States, impose targeted gender discrimination laws specific to the pay/benefits/equity context. Examples include EU Equal Pay Directive 75/117, the Ontario and Quebec Pay Equity Acts, the U.K. Equal Pay Act of 1970, and the U.S. Equal Pay Act of 1963. Plus, some countries impose gender-specific discrimination laws, like Korea's Gender Equality Employment Act, that reach—but are not specific to—compensation.

"Comparable Worth"

Some targeted gender pay discrimination laws impose what in the United States is called "comparable worth" analysis and in the U.K. is called "work of equal value." Comparable worth/equal value laws require equalizing ("validating") pay across separate job categories traditionally worked by one gender or the other. For example, an employer's secretaries might argue they contribute as much comparable worth/equal value as the company's truck drivers and therefore deserve the same pay rate even though the employer has completely different pay scales for secretaries and truck drivers.

Decades ago, U.S. workers' rights advocates and law professors championed comparable worth as a possible extension of U.S. employment discrimination law. But the U.S. Supreme Court has disfavored the comparable worth concept as an interpretation of federal antidiscrimination laws. The primary reference here is the Court's 1981 decision in *County of Washington v. Gunther*.

Foreign pay discrimination laws can be much broader than analogous U.S. concepts.

Those of a particular economic disposition might argue that comparable worth is un-American in its core assumption that experts can somehow "validate" pay rates across distinct job categories. The comparable worth concept rejects the basic Chicago-school free-market capitalist principle that the wage differential between any two jobs is our free-market economy's inherent reflection of those two jobs' relative contributions to society. To a free marketeer, market wage rates, by definition, reflect the "worth" or value of any given job. Pilots earn more than cab drivers because society values pilots more, which also explains why pilots earn more than, say, flight attendants. Those of this disposition might inquire: Do we really want to open the comparable worth Pandora's box and unleash industrial workplace experts pontificating on relative values of dissimilar jobs without regard to those jobs' actual market pay rates?

But this is just a parochial American view. Comparable worth mandates thrive in certain other jurisdictions, imposing real burdens on local employers' compensation systems, particularly but not exclusively in the public sector. In February 2012, for example, Fair Work Australia (an adjudicatory body) issued a sweeping decision under Australia's Fair Work

Act of 2009 that boosted pay for a class of more than 200,000 women in Australia's "Social and Community Services Sector" on a comparable worth theory. Fair Work Australia determined that "for employees in the SACS industry, there is not equal remuneration for men and women workers for work of equal or comparable value with comparison with workers in state and local government employment."

Similarly, Ontario's Pay Equity Act requires employers to affirmatively run comparable worth/equal value analyses—and Ontario's increasingly proactive Pay Equity Commission launches unannounced enforcement audits. The Quebec Pay Equity Act is just as strict; Quebec's pay equity law is designed to address pervasive compensation discrimination against women that can be viewed as the outgrowth of traditional biases and stereotypes.

Beyond Europe, Brazil and China impose job-category pay discrimination rules.

Check whether a multinational's operations include any comparable worth jurisdictions. In those locations, be sure to comply with comparable worth mandates, however strict.

Local Citizenship

Moving beyond gender, another basis for discrimination subject to special scrutiny under some countries' pay-specific discrimination laws is *local citizenship*—a category unexpected for Americans. Some developing countries prohibit employers from compensating aliens more generously than locals, resisting those multinationals that "parachute in" expatriates who are rewarded better than locals who work every bit as hard. For example, Article 44 of the Bahrain labor law mandates that "wages and remuneration" of "foreign workers" not exceed pay for local "citizens" with "equal skills" and "qualifications" unless necessary for "recruitment." Article 358 of the Brazil labor code requires that "salary" of a local citizen not be "smaller" than pay of a "foreign employee perform[ing] an analogous function." Watch for laws like these when structuring expatriate packages.

"Job Category" Pay Discrimination

So far we have been discussing pay discrimination laws that are conceptually similar to U.S. employment discrimination laws in that they get triggered only if an employer disadvantages an employee based on protected-group status. Moving now beyond protected-group discrimination laws, many countries outside the United States impose separate "job category" or "colleague" pay discrimination laws—in France, called "equal work equal pay" laws—under which every employee enjoys a legal right to be rewarded the same as similarly situated colleagues in equivalent jobs, *even if both the disfavored employee and the comparator belong to all the same protected groups.*

As applied to a single job, these laws are conceptually simple: Two colleagues working the same position enjoy a legal right to the same pay package, even if both are white 45-year-old Christian men originally from Norway or even if both are black Muslim 26-year-old women originally from Yemen. Under these job-category or colleague-pay discrimination laws, job category becomes, itself, a protected group. To pay different wages or benefits to two identically situated colleagues working the same job is illegal even if the two are twins; the lower-paid colleague has a legal right to "equal pay for equal work."

Going further, a rarified version of job-category discrimination law addresses irregular—temporary/part-time/contingent—status. Indeed, EU Directive 97/81/EC prohibits pay discrimination on the basis of *irregular status* such as temporary, part-time, or contingent work. This means that European employers cannot legally pay their temps and part-timers lower wages or stingier medical insurance or retirement benefits. These same laws can even force European employers to credit part-time service as full-time for calculating years-of-service requirements. From a U.S. perspective, this concept is a "game changer." American employers almost universally deny American part-timers and temps the full package of benefits available to regular full-timers, and American employers often pay part-timers and temps lower hourly wages than regular full-timers. As just two examples, this practice explains the huge uptick in U.S. universities' use of adjunct faculty and U.S. law firms' use of contract lawyers. In Europe, these practices would constitute illegal pay discrimination.

Another version of job-category discrimination is the equal pay law doctrine in the Czech Republic: employers operating across the country must pay their employees in similar jobs equal pay rates regardless of location (irrespective of protected group status). Czech unions push employers to live up to "geographic equal pay," and so some Czech employers run internal analyses to ensure compliance. The Czech geographic pay equity rule causes headaches for employers

operating across the Republic because (not surprisingly) cost-of-living and market pay rates in the Prague area significantly outstrip pay in the Czech countryside.

Beyond Europe, two countries that impose job-category discrimination rules of one type or another include Brazil and China. Article 461 of the Brazil labor code mandates equal pay among employees who perform "identical" work of the "same value." The text of article 461 seems to link this mandate to protected group status—"sex, nationality or age"—but Brazilian courts completely decouple the equal pay mandate from protected group status. A 2007 appellate tribunal case explains that "what is relevant for the purpose of [Brazilian] equal pay [analysis] is whether the identical tasks were performed by the claimant and comparable colleagues with the same quality and productivity"—*regardless* of sex, nationality, or age.

China's 2008 Employment Contract Law mandates that "the principle of equal pay for equal work shall be observed" (absent a union agreement to the contrary), without linking "equal pay" to gender or other protected group status. Implementing regulations are silent on equal pay; Chinese law on this point remains underdeveloped.

Job-category or colleague-discrimination laws get even trickier where they enter the realm of *comparable worth/equal value*—equating separate jobs that purportedly contribute equal value to an organization but without linking claims to comparators' protected-group status. For example, France's job-category pay discrimination law allows for comparable worth/equal value theories but subject to employer defenses based on different lengths of service or different performance and responsibilities, as well as affirmative action/"positive discrimination" for nationality. In *Meier v. Alain Bensoussan*, a landmark French case from 2008, a lawyer won a daily lunch subsidy that the employer law firm had granted only to nonlawyer staff on the theory that the law firm could not legally favor employees in a lower professional category. This principle has been affirmed and expanded in later rulings.

In a June 2009 decision under the Finnish Employment Contracts Act of 2001, Finland's Supreme Court mandated the equalization of employee benefits across two very different job categories. In that case, a construction company had enrolled its *clerical* workers in a generous medical insurance plan that had excluded its *construction* workers. The construction workers sued for the medical insurance under a job-category (not gender-linked) comparable worth/equal value theory—and won. The employer argued, but failed to prove, that each clerical worker contributed greater value. The court ordered the employer to extend the insurance benefit to the construction workers.

These cases, of course, require "validating" allegedly comparable jobs. Not all jobs claimed to be comparable are actually comparable. In the 2008 case of *Fornasier v. Sermo Montaigu*, a French court ruled that a human resources job is not functionally comparable to—and therefore does not merit the same pay as—positions of "project manager" and "commercial manager."

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In complying with pay discrimination laws internationally, be prepared to wade into foreign discrimination waters deeper even than those afforded by the comparatively robust body of employment discrimination law in the United States. Any multinational offering cross-border rewards schemes should verify that its cross-border (and foreign local) pay, bonus, benefits, commission, and equity programs comply with each affected jurisdiction's prohibitions against both "protected group" and "job category" pay discrimination. Global human resources compliance audits that reach pay discrimination should account for the various theories in play here, including comparable worth discrimination and local citizenship discrimination. At the extreme, countries like France and Finland actually impose mandates requiring "job category comparable worth" validations; these countries prohibit pay discrimination across distinct job categories regardless of claimants' and comparators' protected group status. ◆

OPEN FOR BUSINESS IN MYANMAR

Hurdles Remain for Foreign Investors But Opportunities Abound

By William D. Greenlee Jr.

Following the recent transition from military to nominally civilian rule in 2011 and with the removal of the majority of international sanctions, foreign investors are now eager to grab a slice of the action in a fast-emerging economy described by the International Money Fund as the next Asian frontier and even tipped as the next Asian Tiger. With a geopolitically strategic position, a vast wealth of natural resources, an estimated population of around 60 million, strong economic growth, and untapped markets in virtually every industry, the country offers tremendous possibilities for foreign investors. But a number of difficulties remain, making investment here a potentially high-risk enterprise.

From 1988 until the end of 2013, pledged foreign direct investment in Myanmar exceeded $44 billion, with the leading investments in power, oil and gas, mining, and manufacturing industries. Increasing investment is expected in the hotel and tourism, real estate, and retail sectors once these are opened to foreign investment in 2015.

The Current Climate

After decades of social and economic isolation, the new government under the presidency of Thein Sein is proactively pursuing an open-door policy to foreign investment. Unlike some of its Asian neighbors, Myanmar has not been able to simply evolve its economic system and encourage foreign direct investment; it first had to begin an evolution of its political system and pursue democracy. Although this presents significant challenges, it is believed by many that the country will be successful and Myanmar will ultimately be a stronger and more attractive economy for it.

While Myanmar is currently more stable than it has been for the majority of the time since independence from the British in 1948, concerns remain that the gains made so far are not irreversible. UN Secretary-General Ban Ki-moon and others have identified ongoing ethnic conflict in border areas and increasing anti-Muslim violence as factors that, if not addressed, could provoke more upheaval and undermine the reform process.

The elections planned for 2015 will represent a further test for the current administration because Aung San Suu Kyi of the opposition National League for Democracy party (NLD) has stated she intends to run for the presidency. However, at this time, the Myanmar Constitution does not allow for her to do so. It is reported, though, that she may have up to 80 percent of the popular vote. Most believe that Thein Sein (and the Myanmar government generally) and Aung San Suu Kyi (and the NLD) will be able to come to some sort of agreement prior to the 2015 elections, which will likely involve only moderate constitutional reform initially, and thus avoid any unrest. All of the relevant parties have been working very well together for the past 18 months or so—in other words, since the time Aung San Suu Kyi and various other NLD members were voted into Parliament. The good news is that the Myanmar government appears very committed to continuing economic, political, and legislative reform and to courting overseas investment.

Positive Legislative Changes and Other Developments

There has been steady, although slow, progress with respect to making the changes necessary for commercial laws and other structural issues in Myanmar. According to U.K.-based global risk and strategic consulting firm Maplecroft, Myanmar has made the most significant improvements to its business environment of any country in 2014. Maplecroft points to significant steps being taken to create a transparent, well-understood playing field and to enhance investor protection. While this only translates to a change in ranking from the bottom in 2012 to fifth from the bottom in 2014, it has already resulted in significant improvements for business. Maplecroft forecasts that if

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Myanmar sustains its current trajectory, it may move out of the "extreme risk" category as early as the next one to three years. By way of comparison, all the hotly tipped economies of Brazil, Russia, India, China, Mexico, Indonesia, Nigeria, and Turkey (BRIC and MINT) are categorized as "'high risk," except for Turkey, which is classed as a "medium" risk.

The Foreign Investment Law, Notification, and Rules, 2012–2013

The Foreign Investment Law 2012 (FIL) and the accompanying Foreign Investment Notification 2013 (FI Notification) and Foreign Investment Rules 2013 (FI Rules) are the most notable pieces of legislation to be enacted with regard to facilitating foreign investment. They supersede the previous Foreign Investment Law of 1988 and provide significant incentives for overseas investors including land use rights, government guarantees, and tax exemptions and relief. While foreigners may not own land, in contrast to previous years, foreign investors can now secure control over land through long-term leases of up to 50 years, with the possibility of two extensions of 10 years each.

The FI Notification categorizes business activities into (i) those that are currently prohibited to foreign investment, (ii) those that require a joint venture with a Myanmar citizen, and (iii) those that are possible with 100 percent foreign investment but subject to other conditions, such as approval from the relevant ministry; compliance with other rules, regulations, and guidelines; and/or the requirement to carry out environmental/social impact assessments. Some of the conditions in fact impose a cap on the level of foreign investment, necessitating a joint venture with a Myanmar citizen, or require a joint venture to be undertaken with the state. Foreign investment is being actively encouraged in categories (ii) and (iii) and is also possible in the case of most category (i) activities, which are in theory prohibited subject to special permission from the government, although, in such cases, investment will usually be restricted to joint ventures with a maximum of 80 percent foreign investment.

The Foreign Exchange Management Law, 2012

The Foreign Exchange Management Law 2012 (FEM) replaced the strict approval requirements of the Central Bank of Myanmar (CBM) that existed under the previous Foreign Exchange Regulations Act 1947. These requirements required every foreign currency payment out of the country to be pre-authorized by the CBM. The law is intended to liberalize transfer payments and foreign exchange transactions relating to current account transactions. However, with respect to capital account transactions, foreign currency may be retransferred abroad only after receiving pre-authorization from the CBM. The CBM involvement in foreign exchange transactions for the time being may represent a hurdle in certain scenarios; however, such transactions have been permitted in the past on a relatively regular basis and are currently so, as well.

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958

Another development that should lend confidence to potential investors is the accession of Myanmar to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. This means that foreign arbitration clauses should be permitted in agreements and Myanmar courts will be obligated to enforce foreign arbitration awards. Domestic legislation is still awaited to implement it, however, and the local judiciary must be educated and trained to ensure that the New York Convention and the implementing law are applied in accordance with international practice.

Myanmar may move out of the "extreme risk" category in one to three years.

Caveat Investor

Despite the myriad of opportunities, some investors are still cautious about entering the market in Myanmar. Government ministers have become so accustomed to foreign companies engaging in protracted discussions regarding potential investment, only to ultimately decline, that they have coined the acronym "NATO" (no action, talking only). Investor caution, however, is warranted. So what are the challenges and risks facing foreign investors in Myanmar?

Lack of Rule of Law

Concerns relating to Myanmar's legal system and the lack of rule of law are cited as one of the principal obstacles by many investors. Many of the initial reforms were the result of "policy proclamation," rather than substantive legislative and/or regulatory changes. While the legislative process has begun to

make progress, there are still a large number of laws that are old and are from colonial days. Those issued during the junta years (approximately 1962–2010) are vague, contradictory to prior laws, and problematic for foreign investment. The laws enacted in the last couple of years that have been issued by the executive branch (which is still dominated by former military officers) and approved by Parliament (which was only just recently created under the 2008 Constitution) do move in the right direction of encouraging foreign investment. However, they are still vague, they conflict with previous legislation, and they do not yet create a legal environment that allows for investment structures common in other international jurisdictions or for a clear understanding of rights and liabilities to enable a full appreciation of relevant risks.

Examples of used but outdated laws include the Oilfields Act, which dates back to 1918; the Companies Act, which dates back to 1914 (now set for revision with the assistance of the Asian Development Bank); and the Contract Act, which dates back to 1872. Examples of laws lacking specificity include both the FIL and the FEM, which are vague and have given rise to a number of uncertainties with respect to implementation.

Theory vs. Practice: The Disconnect

Potential foreign investors should also be aware that the procedure to be followed in theory is not necessarily the process followed by the ministries and government officials, who sometimes operate in accordance with long-established standard practices based on their own interpretations of applicable laws or simply practice, generally.

Policy, rather than legislation, guides the process in all sectors. For example, the executive branch determines when banking and financial services other than microfinance and insurance will be opened up to foreign investment. Initially, full-service licenses in these sectors were to be granted to foreign investors in 2015. More recently, certain officials have made public statements and written articles in state-owned newspapers indicating that up to five foreign bank licenses will soon be issued. Policy still controls.

The situation is improving, particularly for those working with agencies and authorities accustomed to dealing with foreign investment, such as the Myanmar Investment Commission (MIC) and Yangon City Development Council. However, investors should be prepared for a high level of bureaucracy, delays, and hurdles in obtaining the necessary approvals, registrations, and certifications required to conduct business.

Lack of Security

The inadequacy and inconsistency of the laws and the lack of an established practice for taking, perfecting, and enforcing security over assets have been and remain problems. Projects in the past have thus been financed via equity, and not debt. Current legislation (the Transfer of Property Act 1882, s59; Registration Act 1909, s17(1)(b); and Companies Act 1914, s109) provides for the creation of mortgages and charges for property, including immoveable assets, but the Transfer of Immoveable Property Restriction Act of 1987 (passed, of course, during junta rule) effectively prohibits foreign ownership of land and the transfer of immoveable property by mortgage, acceptance of mortgage, exchange, or transfer. This applies as well to a foreign bank that needs title to sell a property in the event of default on a loan. In practice, even one foreign-owned share in a company will make that company a foreign company. Nominee ownership arrangements through Myanmar citizens are strictly prohibited. Section 17 of the FIL does, however, allow a Myanmar FIL company with one or more foreign shareholders to mortgage long-term leased property rights. Unfortunately, the ministries required to provide relevant approvals are reluctant to approve such debt structures, as they have never done so and are reticent to be the first. They provide another example of how practice, rather than the relevant law, controls.

There are currently several large transactions with influential parties working their way through the system. These should be sufficiently significant transactions such that the relevant ministers will themselves approve the use of long-term lease rights to be mortgaged and ultimately allow true debt financing of projects.

Charges over immoveable property are a potential option for foreign lenders, as they do not involve transfer of land. But problems remain with perfecting this form of security.

The law requires that the Myanmar Register of Companies (DICA) maintain a register of all mortgages and fixed and floating charges over company assets. However, in practice, this register is poorly maintained and the need to obtain prior approval prior to enforcement can be burdensome. Perfection of a security is, therefore, very difficult and the few mortgages taken are rarely, if ever, registered. This, too, will likely be evolving and improving in the near future.

Lack of Infrastructure

Another major concern for potential investors is the absence of both hard and soft infrastructures. The problem ranges from poor electricity supply and waste management (which presents a hurdle for manufacturers); to limited Internet and telecommunications service; to high logistical costs and weak road, rail, and port links and human resources; to the absence of a well-developed economic infrastructure.

The lack of a sophisticated banking and finance sector in what is still largely a cash economy is another major issue for foreign investors. No foreign banks are currently permitted to operate in Myanmar and, while this will likely change in the near future, at present the limited number of state-owned and private banks currently operating in the country lack the experience, expertise, capital, or liquidity to handle the financial requirements of large multinationals. Electronic transfer of funds both internally and internationally remains difficult, and easy loans, financial products, interbank operations, and

credit are all virtually nonexistent. Foreign investors often have to finance their operations through shareholder loans through the offshore parent company.

Lack of Capacity

Following the enactment of the FIL, the number of foreigners who want to invest in Myanmar has increased significantly. However, after many years of semi-isolation, there is a lack of skilled professionals and labor generally. Although the people of Myanmar are quick learners and very motivated, this shortage will likely remain an issue for at least the immediate future.

Biting the Bullet

Despite the challenges, many major foreign companies have invested in Myanmar. They include Ford, Coca-Cola, Pepsi, General Electric, Unilever, and Caterpillar, to name just a few. A typical corporate structure involves a holding company in Singapore (due to a strong double tax treaty), which is then used to incorporate a subsidiary in Myanmar.

Past experience indicates that the MIC prefers greenfield investments that can be set up and operated from the beginning under the FIL. However, while a foreign investor cannot control a 100-percent Myanmar-owned company through board appointments, the Myanmar Citizens Investment Law and certain new rules under the FIL appear to open the door to merger and acquisition transactions for Myanmar citizens and to foreigners who want to invest in Myanmar targets. This is a tremendous step forward. There are several ways in which merger and acquisition transactions can be carried out in Myanmar, some of which have been tried and tested, while others are more theoretical in that the current laws, practices, and policies do not forbid them, but they have not been utilized to any great extent in Myanmar to date. As mentioned though—this will soon change.

While a number of industries are restricted to Myanmar citizens and companies, it is expected that the entry barriers for foreign investors in many business sectors will be relaxed over the coming years, particularly as the countries of the Association of Southeast Asian Nations (ASEAN) approach the target date of a single economic community by 2015. Arguably, testing and developing the new legal and regulatory framework by actually doing business in this new democracy will make the systems more robust and pave the way for further reform, which is already on a positive and steep track.

Although Myanmar is in the early stages of its ambitious evolution, the country is now opening up to foreign investment and, despite the challenges, many companies are establishing themselves there. After all, being first in a market, especially one with such potential, provides a real market advantage. Yes, such investors have a high tolerance for risk. However, with good advice, the risk can be managed and such management will allow for operating transparently and generating revenue. Early movers will likely enjoy the greatest benefits. ◆

IMMIGRANT INVESTOR VISAS

Emergent Trends Around the World

By Catharine Yen and Christian Triantaphyllis

Immigrant investor programs are on the rise in countries around the world, including the United States, Singapore, Hong Kong, Australia, Spain, and Germany. The consistent theme among these immigrant investment programs is that a foreign national invests a certain amount of money into the country's business sector and in return receives some sort of immigration benefit, generally an offer of permanent residency or citizenship. Criteria and expectations range widely from country to country; the Dominican Republic, one of the least expensive countries, requires an investment of approximately $100,000, while Austria tops the most expensive by requiring an investment of approximately $10 million.

This article describes the immigrant investor programs in the United States, Canada, Singapore, and Hong Kong; explains how and why each country's government has changed and amended its own immigrant investor program; provides an overall picture of the United States' EB-5 investor program; and offers thoughts on the U.S. program based on trends in other countries around the world.

Background on Immigrant Investor Programs

United States

The U.S. Immigrant Investor Program, commonly known as the "EB-5 program," was established in 1990 to stimulate the U.S. economy by encouraging foreigners to invest in the country and create new jobs. Each investor must invest either $500,000 or $1 million (depending on the location of the project) in a new commercial enterprise. The investor must create at least 10 full-time jobs for qualifying U.S. workers within two years of making the investment. When the investor makes the investment, a conditional green card is granted to the investor for two years. At the end of the two-year period, if the investor can show that the investment created 10 new, full-time jobs and the investment was sustained in the new commercial enterprise throughout those two years, then the investor becomes a full-fledged green card holder with a future opportunity to apply for U.S. citizenship.

The EB-5 program places a heavy emphasis on creation of the requisite number of jobs and the lawfulness of the funding source. The EB-5 program also requires that the investment be "at-risk," with no guarantee that the initial capital contribution will be returned to the investor in the future. Therefore, the investment must create a risk of loss and a chance for gain. The EB-5 program is the most popular immigrant investor program in the world, especially among extremely wealthy Chinese nationals. Yet, despite its immense popularity, Congress has not modified the laws or regulations of the EB-5 program since its enactment in 1990.

Canada

Until recently, another popular immigrant investor program was Canada's Immigrant Investor Program (CANIIP), which enabled qualified investors to obtain unconditional permanent resident status in Canada through an investment of $800,000 Canadian (approximately $734,000 U.S.). Citizenship and Immigration Canada (CIC) would then divide up the investor's investment between participating provinces and territories and use the funds to develop their economies and create jobs. Under Canada's program, the investment was guaranteed and CIC would return the investment, without interest, approximately five years later.

However, on February 11, 2014, the Canadian government announced its intent to terminate CANIP to pave the way for new pilot programs geared more towards benefiting Canada's labor market and economic needs. The Canadian Ministry of Finance stated that Canada has "significantly undervalued Canadian permanent residence." Thus, Canada is in the midst of reformatting and reinventing its immigrant

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investor program, which has led foreign nationals to explore other, riskier options, such as the EB-5 program, to invest and, in return, acquire immigration benefits.

Singapore

Singapore initially had two immigrant investor programs: the Financial Investor Scheme and the Global Investor Program (GIP). The Financial Investor Scheme, created in 2004, allowed individuals with net personal assets of $20 million Singapore (approximately $16 million U.S.) to fund Singapore's financial institutions or private banks. As Singapore's Financial Investor Scheme became increasingly popular, the government decided to raise dramatically the required investment sum by doubling the amount from originally $5 million Singapore to $10 million Singapore in 2010. Unfortunately, the program was terminated in April 2012 because of public discontent due to its effects on rising prices and a surge of foreign residents.

Singapore's second immigrant investor program, the GIP, is still intact. It requires investors to invest at least $2.5 million Singapore in launching a new enterprise in Singapore, enriching an existing business in Singapore, or investing in a GIP-approved fund that invests in Singapore-based companies. In return, the investor will receive permanent resident status, which is subject to renewal every three or five years, depending on various factors. The investor is required to show Singaporean authorities how the business will succeed based on the investor's business experience, business plan, investment plan, and entrepreneurial skills. Furthermore, the Singapore government often acts as agent in finding a suitable partnership between foreign investors and local Singaporean businesses. By 2010, according to the Singapore Parliament, entrepreneurs applying for permanent residency through the GIP had invested $1.5 *billion* Singapore in Singapore and created 1,500 jobs as a result of the program, which is very impressive for such a young program.

Hong Kong

Hong Kong's immigrant investor program, called the Capital Investment Entrant Scheme (CIES), was created in 2003. Hong Kong's program allows an investor who is at least 18 years old to invest at least $10 million Hong Kong (approximately $1.3 million U.S.) in either real estate or specific financial assets such as equities, debt securities, certificates of deposits, or subordinated debt. However, in October 2010, the Department of the Government of Hong Kong terminated the real estate class. Thus, investors may now only invest in specific financial assets. Once the investor furnishes proof to the satisfaction of the director of CIES, then the investor has permission to stay as a non-Hong Kong permanent resident for two years. The investor can then apply for extensions of two years subject to the condition that the investor must continue to satisfy the CIES requirements. The investor may then apply for Hong Kong permanent residency after seven years of being a non–Hong Kong permanent resident.

In Hong Kong, investors are not permitted to realize or cash in any capital appreciation of the qualifying portfolio. However, if the value of the portfolio falls below the original $10 million Hong Kong, then the investor does not lose his permanent residence status either. Additionally, compared to the U.S. EB-5 program, CIES is extremely flexible, since the investor can choose an investment portfolio among a wider range of assets and may switch his investment within the class of permissible assets at any time.

Chinese Nationals Dominate the Investor Programs

In January 2014, CNBC News released a report stating that 64 percent of Chinese millionaires had either emigrated or planned to emigrate out of China. Based on our experience, it seems that most Chinese nationals are emigrating to provide better educational opportunities for their children and quality of life for themselves, to escape the oppressive Chinese government and financial system, and to diversify their investments in other places around the world. When Canada terminated its program, approximately 70 to 80 percent of the U.S. backlog of cases came from Chinese applicants. Additionally, according to statistics released by the Hong Kong government in December 2013, approximately 89 percent of its applicants are Chinese nationals. This pattern of emigrating Chinese nationals is also apparent in the United States' own EB-5 program, with approximately 70 to 80 percent of EB-5 petitions being filed by Chinese nationals. In fact, there has been such a surge of Chinese EB-5 applicants that, as of August 23, 2014, the EB-5 visa quota for fiscal year 2014 was reached, the U.S. Department of State announced. This means that Chinese nationals will still be permitted to file I-526 petitions to the U.S. Citizenship and Immigration Services (USCIS), but they will not be eligible to receive their EB-5 visas until the beginning of the next fiscal year, which begins on October 1 each year.

Recent Trends

Trends among immigrant investor programs over the years demonstrate that they are moving away from conservative real estate investment options and becoming focused on ensuring

that the investment is "at risk" and one that can stimulate the economy and create jobs. There may be several reasons for this shift within immigrant investor programs. Governments want to avoid the negative stigma that comes with public perception that the government is essentially selling green cards to wealthy foreign investors. An "at risk" investment, similar to a risky decision to invest in the stock market rather than simply depositing funds into a bank account, is a concept that all investors can relate to and understand.

As a result, trends indicate that parking investment funds in a bank account or making an investment in land is not going to result in receiving lawful permanent residence status with immigrant investor programs around the world. Furthermore, tweaking an immigrant investor program so that it focuses on stimulating the economy and creating jobs helps mitigate negativity felt about the program by the general public within the country. For example, in Singapore or Hong Kong, where square footage of living space is limited, an immigrant investor program that allows for simply purchasing real estate could have a direct negative impact on country nationals by dramatically driving up real estate prices. Conversely, positive messages of economic growth and job creation help mitigate xenophobic or nationalist ideological reactions toward foreign investors taking advantage of immigrant investor programs.

While immigrant investor programs tend to lean towards emphasizing risk, economic growth, and job creation, they also appear to be evolving to meet modern business needs. This means more business flexibility and fluidity exist within the programs overall. Notably, U.S. businesses are becoming interested in participating in the EB-5 program. This interest can be better understood by reviewing recent U.S. economic history.

When the U.S. economy crashed in 2008, banks tightened the reins on lending, and businesses suffered. As a result, entrepreneurs began looking for alternative ways of finding capital, which led to a dramatic increase in popularity for the EB-5 program. The EB-5 program does not limit investment into different types of business organization structures, provided that the entities are "for profit" business operations. For example, investing in either a corporation, limited liability corporation, limited partnership, or sole proprietorship is acceptable. Terms for accessing EB-5 funds are flexible and EB-5 capital allows one to avoid having to acquire financing through loans with high interest rates. Furthermore, the foreign investor's investment does not have to be paid for in cash, although that is currently the most popular form of EB-5 investment—it may also be in the form of equipment, inventory, or other tangible property. All capital is valued in U.S. dollars and at fair market value. Thus, for example, a foreign investor could invest $1 million worth of machinery into a manufacturing plant and have it qualify as an investment under the EB-5 program. In addition, under the EB-5 program there are benefits to investing in certain high-unemployment or rural areas, which may increase support in the local community for projects and businesses supported by foreign investment.

Overall, the EB-5 program has become an attractive way to market business relationships internationally. Many overseas investors still consider the United States as the land of opportunity and want their children to have the educational and professional opportunities that the country offers. Thus, there is strong incentive for foreign investors to obtain green cards for their children, and using an immigration benefit as a selling point allows businesses to obtain foreign capital more easily.

The Future of Immigrant Investor Programs

The EB-5 program will continue to develop over the next several years. Among U.S. immigration reform proposals currently under consideration are those that focus on the EB-5 program. For example, members of Congress have suggested that the EB-5 program be made permanent, instead of renewable every three years, to allow for more EB-5 immigrant visas to be available each year; to increase incentives for investment in certain high-unemployment or rural areas; to eliminate per country quotas, which would free up more green cards for Chinese nationals; and to raise the minimum investment amount from $500,000 to an amount to be determined. By reforming the EB-5 program, Congress would be providing an opportunity for additional foreign capital to flow into the U.S. economy to generate jobs for U.S. workers. The best and brightest businesspeople and entrepreneurs will undoubtedly take advantage of this opportunity by raising even more capital for U.S.-based projects, which, in turn, will benefit the entire country.

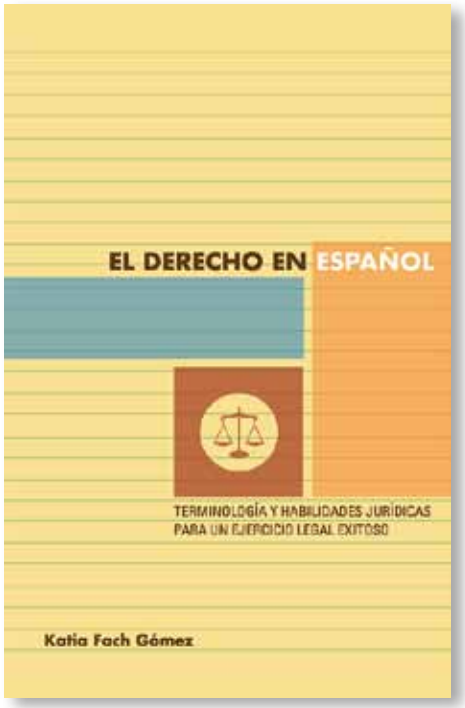
As governments continue to develop and refine their immigrant investor programs, it will be very interesting to observe what happens as some implement more rigid, less inviting policies and reduce foreign investment while others open up investment opportunities and stimulate local economies. ◆

EL DERECHO EN ESPAÑOL

Terminologia y Habilidades Juridicas Para Un Ejercicio Legal Exitoso

By Katia Fach Gómez

University of Texas Press, May 2014



Reviewed by Alexandra Rengel

The rise of the global economy and cross-border litigation has increased demand for lawyers who are fluent in other languages and familiar with foreign legal systems. Lawyers who are able to understand the legal jargon in a foreign language are better qualified to handle deals and disputes arising in the international context. Cross-border legal representation has become commonplace and lawyers from different countries increasingly collaborate. Fluency in legal Spanish opens doors to a world of opportunities, as Spanish is the second most widely spoken language in the United States and one of the three most commonly used languages in the world. Spain and Latin America continue to provide a wealth of opportunities for business and commerce, and lawyers are realizing the benefits of having fluency, not only in the Spanish language but also in Spanish legal jargon.

Understanding the use of a foreign language in the legal context is more involved than merely translating words; it requires a linguistic sophistication that must be learned. *El Derecho en Español*, authored by Katia Fach Gómez, is an excellent resource for those professionals who need to have a knowledge of legal Spanish. *El Derecho en Español* is a user-friendly activity book that teaches traditional and well-known legal terms, canons of interpretation, default rules, and common usages of terminology used in legal Spanish. This book can be used in a myriad of ways. It can be used by those who are fluent in Spanish but not familiar with Spanish legal jargon, as an activity book to teach legal Spanish, and as a reference source for those practitioners collaborating with their Spanish and Latin American counterparts and wanting to understand legal Spanish in context.

Although other books purport to teach legal Spanish, they are mostly dictionary-type books, which do not adequately cover the needs of those who want to improve and update their knowledge of legal Spanish and its framework of applicability. Other books devoted to learning legal Spanish are very basic and do not address legal drafting in Spanish, which is essential for law practitioners. *El Derecho en Español* provides users the added benefit of practical exercises designed to measure their learning in the various areas of the law. This book clearly fills a gap in what is currently available in the market on the subject.

As a law practitioner in both Spain and the United States, I have experienced the benefits of being able to communicate utilizing the appropriate legal terminology in my work in each jurisdiction. *El Derecho en Español* is a very comprehensive guide that effectively teaches legal Spanish and I highly recommend it for anyone working in a law-related field who wants to become familiar with Spanish terminology as it is used in real legal transactions. ◆

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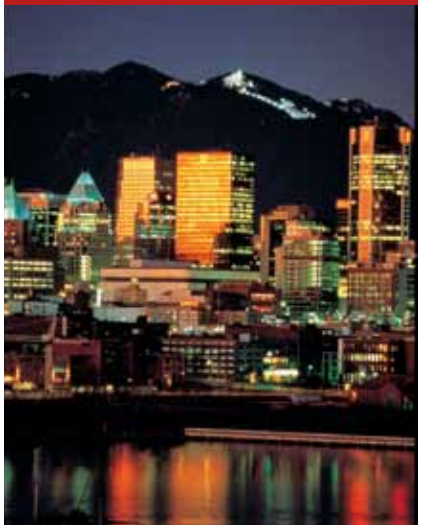

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